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Attorney for Charles C. Johnson

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

NATIONAL ABORTION FEDERATION

Plaintiff,

v.

CENTER FOR MEDICAL PROGRESS, *et al*

Defendants.

Case No.: 15-CV-03522-WHO

**JOHNSON'S REPLY TO NAF'S  
OBJECTION TO SECOND MOTION TO  
QUASH THE SUBPOENA OF CHARLES  
C. JOHNSON**

**Date: Dec. 23, 2015**

**Time: 2:00pm**

**Location: Courtroom 2, 17<sup>th</sup> Floor**

Re: Dkt. Nos. 185, 191 - 194, and 201

**MEMORANDUM OF POINTS AND AUTHORITIES**

Charles C. Johnson raised in his Second Motion to Quash that several documents requests attached to the subpoena *duces tecum* must be quashed.

The Ninth Circuit has found in non-grand jury journalist privilege cases, "that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and balance struck to determine where lies the paramount interest." *Farr v. Pitchess*, 522 F.2d 464, 468-469 (9<sup>th</sup> Cir. 1975).

1 The 9<sup>th</sup> Circuit has found that there is a qualified journalist privilege in civil cases. *Shoen*  
 2 *v. Shoen*, 5 F.3d 1289 (9<sup>th</sup> Cir. 1993) (*Shoen I*). The Court ruled that the privilege protects non-  
 3 confidential sources and materials. *Shoen v. Shoen*, 48 F.3d 412, 414 (9<sup>th</sup> Cir. 1995) (*Shoen II*).  
 4 *Shoen II* required that the seeking party demonstrate “a sufficiently compelling need for the  
 5 requested materials to overcome [journalist] assertion of the journalist’s privilege. We noted that,  
 6 at a minimum, this requires a showing that the information sought is not obtainable from another  
 7 source.” *Shoen II* at 1296.

8 *Shoen II* found a three part test for when a civil litigant is entitled to requested discovery.  
 9 This three part test is “(1) unavailable despite exhaustion of all reasonable alternative sources;  
 10 (2) noncumulative; and (3) clearly relevant to an important issue in the case.”. *Shoen II*, at 416.

11 In this case, Charles Johnson has raised his journalist’s privilege not to produce certain  
 12 privileged documents. This is a civil case, and Johnson is a non-party to this litigation. It is well  
 13 established law that the burden falls on plaintiff NAF to prove that they are entitled to the  
 14 requested discovery.

15 At no point in the 11 paragraph declaration of Derek F. Foran (Doc 155-5 and 156-1)  
 16 does the plaintiff NAF present any evidence that plaintiff NAF has exhausted all reasonable  
 17 alternative sources. Plaintiff NAF did not file along with their Opposition any other evidence  
 18 other than the declaration of Foran.

19 Furthermore, as is address in Daleiden’s Objections (Doc 280-2), Attorney Foran has  
 20 failed to file his declaration under penalty of perjury as is required by 28 U.S.C. §1746.

21 Federal Law requires that any declaration state “I declare ... under penalty of perjury that  
 22 the foregoing is true and correct.” 28 U.S.C. §1746. Since the Declaration of Derek F. Foran  
 23 failed to state that they were made under penalty of perjury, this Declaration violates 28 U.S.C.  
 24 §1746. Courts have held that when a declaration fails to be filed under “penalty of perjury”, that  
 25 the declaration must be disregarded. *See e.g., Davenport v. Board of Trustees*, 654 F.Supp2d  
 26 1073, 1083 (E.D.CA 2009); *Chao v. Westside Drywall, Inc.*, 709 F.Supp.2d 1037, 1052 (D.C.  
 27 OR 2010); *Nissho-IWAI American Corp. v. Kline*, 845 F.2d 1300, 1305-1306 (5<sup>th</sup> Cir. 1988); and  
 28 *Davis v. Solid Waste Services, Inc.*, 20 F.Supp.3d 519, 529-530 (E.D. PN 2014).

1 Since NAF has failed to put any evidence before this Court that they have exhausted all  
2 reasonable alternative sources and since the Declaration of Foran was not filed under penalty of  
3 perjury, this Court must grant Charles Johnson's Motion to Quash.

4  
5 Respectfully submitted this 7<sup>th</sup> day of December, 2015.

6 Meuser Law Group, Inc.

7  
8 /s/ Mark P. Meuser

9 Mark P. Meuser, SBN 231335

10 Attorney for Charles C. Johnson  
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